STATE OF MICHIGAN

COURT OF APPEALS

MILAGROS DASCOLA and JAMES DASCOLA, Plaintiffs-Appellees, v YMCA OF LANSING, Defendant-Appellant.	UNPUBLISHED May 19, 2011 No. 293475 Ingham Circuit Court LC No. 06-000706-NO

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs Milagros and James Dascola commenced this negligence action after Milagros Dascola slipped and fell in a women's shower at the Westside Community Branch YMCA, a facility owned and operated by defendant YMCA of Lansing. At the close of a trial, the jury found in favor of Milagros Dascola, and the trial court subsequently entered a judgment awarding her $62,298.49 in damages. We reverse and remand for a new trial.

I. FACTS AND PROCEEDINGS

On June 25, 2003, Milagros Dascola[1] swam in the YMCA's pool for around a half-hour before entering the shower area. Dascola recalled that she entered a dimly lit shower stall wearing shower sandals, closed the curtain,

> turned around and I removed the bottom of my bathing suit, one foot at a time . . . . And when I took it off I turned to shower and I rinsed the bottom of my bathing suit to remove the chlorine. And when I turned around that's when I slip and fall.

According to Dascola, "soap scum" caused her fall:

[1] Because James Dascola pursued a derivative loss of consortium claim in this case, the opinion's references to the singular "Dascola" refer to Milagros Dascola.

Q. Mila, do you have any idea what caused you to slip and fall? Are you aware of what the cause was?

A. It's the soap scum. When I turn on that shower, you know, the soap scum that was build on the floor, that goes around and that makes me fall.

In response to questioning by YMCA's counsel, Dascola admitted that she had not looked at the floor before she fell. Dascola explained that afterward, "when [she] was on the floor, [she] touched the floor" and found it "slippery." From Dascola's vantage point on the floor, she observed "a lot of soap scum because over the edge they got some white soap, like soap around it." Dascola further described the soap scum as follows:

Q. … You say you saw some soap scum on the side. Could you describe for us what it is you saw there?

A. It's like, it's made of, you know the soap after people use the soap, you know, it dries out sometimes. You know how they have some white spot around? You know a little bit of all white spot around and everything. That's what the soap scum looks like. And one, the water running and stuff, it makes the flooring slippery, you know, and then all that marking stuff it just keep running around that flooring.

* * *

Q. Okay. So again, what you saw after you fell was you saw these white spots which you thought was soap scum; right?

A. Yeah, it is a soap scum.

Q. It is, okay. White spots of soap scum. And did you see soap scum swirling around? I thought you testified you saw some swirling around on the floor?

A. Okay. When you turn the shower even though you have a lot of soap scum on the flooring because of the water, that white spot will—you know, the dry thing will disappear, that white scum, because it keeps running around, you see?

Q. Okay. And did you see that?

A. It makes it slippery.

Q. And did you see it running around?

A. Some of it I did.

Q. Okay.

A. Because some of them are still there on the floor.

Tanya Murchison, a YMCA guest in the shower area when Dascola fell, recalled that "we all were slipping in there. We had been complaining about it being so slippery on the floor." Murchison later clarified that she had complained of slipperiness in the shower area "a couple of times" before Dascola's fall. Murchison noticed nothing "out of the ordinary" on the shower floor where Dascola fell. Marcus Kirkpatrick, the executive director of the YMCA of Lansing, Westside Community Branch, acknowledged that he had previously received complaints relating to a slippery floor in the women's shower room. Kirkpatrick testified that the women's locker and shower rooms "were cleaned on a regular basis anywhere from every hour to two," and "spot checked every fifteen minutes." Kirkpatrick described that maintenance personnel used a "squeegee" to push water off the floor, sometimes "with a towel over it to dry the water or even a mop as needed."

Over Dascola's objection, the jury visited the shower room. During the jury viewing, a YMCA employee demonstrated the squeegee method the YMCA used to clear water from the shower room floor. Scott Tombaugh, the aquatics director at the Westside YMCA, testified that people complained of slipperiness in the women's shower room "[m]ay be [sic] once a week."

After Dascola presented her evidence, the YMCA moved for a directed verdict, on the grounds that it had no notice of any slipperiness problem specifically caused by soap scum, and, alternatively, that the soap scum was an open and obvious hazard. The trial court rejected both arguments, reasoning in pertinent part as follows:

> On the question of notice: I know of no case law that says you have to have notice of the particular described condition that the lawyer mentions in opening statement. There is no such holding. There is no case that holds that.
>
> What we're talking here about are floors used by individuals in either bare feet or with shower shoes on, that are unreasonably slippery. That's what we're talking about. That is the condition there.
>
> There are a number of possible causes, not all of . . . which are soap scum. It could be soap scum. But it also could be, as we have already heard on this record from a number of witnesses, the idea of people using bar soap, using shower soap that accumulates there for whatever reason, in its condition.
>
> Did the YMCA have notice? The Jury can certainly conclude that they did. There is evidence on this record that prior to this incident, they were told of a problem with slippery floors in the women's shower. That's notice.
>
> So the notice is certainly sufficient, under Michigan law, as I can consider from the record that's before the Court. They were given notice. And there is certainly no requirement that somebody that gives notice has to describe it in the same terms that a lawyer would. You don't have to say there is soap scum slipperiness. I'm sure that the users of that facility aren't totally unconcerned about what causes the slipperiness. What they're concerned about is to be able to safely traverse the floor, the shower room floor. That's what they are concerned

> about. And the condition they reported is slippery floors, which is the same condition the Plaintiff says, if the Jury believes her, that she found on this occasion after she fell, a slippery floor. She felt that it was slippery. She detected the conditions of which she has testified to.
>
> There is a sufficient amount of evidence, in my view, on the question of notice to go to the Jury. There is ample evidence that this condition had existed over a period of time.
>
> Open and obvious, suffice it to say that there is no evidence that this is open and obvious. There is a photograph taken later of a condition that there is some evidence on the record is somewhat similar. I can't say it's open and obvious. . . . And the Court would not find that the condition was open and obvious, as a matter of law, because somebody was laying on the floor. ….

After the proofs concluded, Dascola moved for a directed verdict on the open and obvious question, asserting that no evidence supported that the soap scum qualified as an open and obvious condition. The trial court granted the motion, finding no "credible evidence that as she entered the shower, under those circumstances, and we've all now seen the shower, that the condition which caused her to fall, according to her testimony, was obvious and it has to be open and obvious." The YMCA then renewed its motion for a directed verdict regarding "the issue of notice." The YMCA emphasized that "no one saw" or reported the presence of soap scum before Dascola's fall. The trial court denied the YMCA's motion, ruling that "repeated complaints from people using the facility about slippery floors" supplied the YMCA with adequate notice.

The trial court instructed the jury as follows with respect to Dascola's premises liability claim:

> The defendant, YMCA, has a duty to use ordinary care to protect an invitee from risks of harm from a condition on defendant's place of business if, one, the risk of harm is unreasonable and two, the defendant knows or in the exercise of ordinary care should know of the condition and should realize that it involves an unreasonable risk of harm to an invitee. In determining whether the defendant should know of the condition, you should consider the character of the condition and whether the condition existed for a sufficient length of time that a defendant exercising ordinary care would discover the condition.

The trial court immediately thereafter proceeded to read a special jury instruction, to which neither party objected, concerning notice:

> I instruct you that in this case the defendant, YMCA of Lansing, is liable for a dangerous condition if the condition was known or should have been known to defendant through actual or constructive notice. "Actual notice" means the defendant had direct actual knowledge of the existence of the dangerous condition prior to the plaintiff encountering it. "Constructive knowledge" of a condition can be inferred from evidence that the condition is of such a character or has

> existed a sufficient length of time that the defendant, YMCA, should have had knowledge of it. Your determination as to how long the condition existed must be based on evidence, not on mere speculation or conjecture. If you find that the defendant or its employees did not have either actual or constructive notice of the alleged dangerous condition prior to plaintiff's fall; then you must find the defendant owed no duty to plaintiff and defendant has no liability for the occurrence.

The jury rendered a special verdict finding the YMCA negligent, awarding no damages to James Dascola, and assessing economic and noneconomic damages on behalf of Milagros Dascola in the amount of $110,088.51. The jury calculated that Dascola's negligence had proximately caused 40% of her injuries and damages.

II. ANALYSIS

The YMCA challenges all three directed verdict rulings in Dascola's favor. We review de novo a trial court's decision on a motion for a directed verdict. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). "In reviewing the trial court's ruling, this Court examines the evidence presented and all legitimate inferences arising therefrom in the light most favorable to the nonmoving party." *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 201-202; 755 NW2d 686 (2008).

> In passing upon a motion for directed verdict, a trial judge must consider the evidence in plaintiff's favor *unqualified* by any conflicting evidence. The trial judge is not prohibited from considering evidence presented by a defense witness per se; rather, the judge may not consider evidence from *any* witness to the extent that it conflicts with evidence in plaintiff's favor. [*Locke v Pachtman*, 446 Mich 216, 226 n 8; 521 NW2d 786 (1994) (emphasis in original).]

These principles find their origin in *Detroit & Milwaukee R Co v Van Steinburg*, 17 Mich 99, 117 (1868), in which Justice Thomas Cooley explained:

> [W]e must look at the case as it appears from the [nonmoving party's] own testimony, unqualified by any which was offered on the part of the [moving party], and must concede to him any thing which he could fairly claim upon that evidence. He had a right to ask the jury to believe the case as he presented it; and, however improbable some portions of his testimony may appear to us, we can not say that the jury might not have given it full credence. It is for them, and not for the court to compare and weigh the evidence. . . .

"Directed verdicts are not favored, especially in negligence actions." *Schutte v Celotex Corp*, 196 Mich App 135, 138; 492 NW2d 773 (1992).

A. NOTICE

The YMCA first contends that because it lacked notice of soap scum on the shower floor, the trial court erred by denying a directed verdict on this ground. "[A] premises owner has a duty to exercise reasonable care to protect invitees, i.e., persons who enter the premises at the

owner's express or implied invitation to conduct business concerning the owner, from an unreasonable risk of harm caused by a dangerous condition of the land that the owner knows or should know the invitees will not discover, realize, or protect themselves against." *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 532; 542 NW2d 912 (1995). Notice of a possible danger "may be inferred from evidence that the unsafe condition has existed for a length of time sufficient to have enabled a reasonably careful [invitor] to discover it." *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979). An invitee such as plaintiff is "entitled to expect" that a premises possessor will "take reasonable care to know the actual conditions of the premises and either make them safe or warn the invitee of dangerous conditions." *Kroll v Katz*, 374 Mich 364, 373-374; 132 NW2d 27 (1965). In *Conerly v Liptzen*, 41 Mich App 238; 199 NW2d 833 (1972), this Court recognized that an occupier's knowledge of the "actual conditions" of the premises demands adequate inspection to discover latent dangers:

> "The occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection. But the obligation of reasonable care is a full one, applicable in all respects, and extending to everything that threatens the invitee with an unreasonable risk of harm. The occupier must not only use care not to injure the visitor by negligent activities, and warn him of latent dangers of which the occupier knows, but he must also inspect the premises to discover possible dangerous conditions of which he does not know, and take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use." [*Id*. at 241-242, quoting Prosser, Torts (3d ed), § 61, pp 402-403.]

More recently, in *Prebenda v Tartaglia*, 245 Mich App 168, 169; 627 NW2d 610 (2001), this Court explained that "[a] possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land" if the possessor

> (a) knows, or by the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to such invitees, (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

This elucidation of the elements of a landowner's duty closely mirrors the Restatement of Torts, 2d:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger. [2 Restatement Torts, 2d, § 343, pp 215-216.]

Indisputably, an invitor's duty encompasses reasonable inspection intended to detect dangerous conditions on the premises. "Generally, the question of whether a defect has existed a sufficient length of time and under circumstances that the defendant is deemed to have notice is a question of fact, and not a question of law." *Banks v Exxon Mobil Corp*, 477 Mich 983, 984; 725 NW2d 455 (2007).

The YMCA had notice that patrons regularly described the floor in the women's shower room as slippery. Arguably, this information placed the YMCA on notice of a need for frequent inspection of the shower room floor. Dascola testified that after her fall, she noticed dried evidence of soap scum "on the side" of the floor: "It's like, it's made of, you know the soap after people use the soap, you know, it dries out sometimes. You know how they have some white spot around? You know a little bit of all white spot around and everything. That's what the soap scum looks like." Contrary to Kirkpatrick's testimony that the YMCA "spot checked" the shower room every 15 minutes for maintenance problems, if the jury accepted Dascola's testimony, it could reasonably infer that excess soap on the floor remained uncleaned for a period long enough to entirely dry out.

The Michigan Supreme Court's analysis in *Clark v Kmart Corp*, 465 Mich 416; 634 NW2d 347 (2001), illustrates that under the circumstances of this case, a jury could reasonably conclude that the YMCA possessed constructive notice of the soap scum. In *Clark*, the Supreme Court examined whether evidence of smashed grapes on a store's floor "would permit a jury to find that the dangerous condition was present long enough that the defendant should have known of it." *Id.* at 419. Although the record did not clarify precisely when the grapes landed on the floor of the checkout lane where the plaintiff had slipped and fell, circumstantial evidence reasonably supported that a "sufficient length of time" had elapsed since the grapes fell on the floor, from which "the jury could infer that defendant should have discovered and rectified the condition." *Id*. at 420. The Supreme Court explained, "The availability of the inference that the grapes had been on the floor for at least an hour distinguishes this case from those in which defendants have been held entitled to directed verdicts because of the lack of evidence about when the dangerous condition arose." *Id*. at 421.

Alternatively in this case, the jury could have rationally inferred that in light of repeated complaints concerning the slipperiness of the floor in the women's shower room, the YMCA negligently failed to inspect and clean the floor with reasonable frequency. Moreover, consistent with the Supreme Court's admonition in *Banks*, 477 Mich at 984, the trial court instructed the jury that the YMCA bore liability for a dangerous condition "if the condition was known or should have been known," through actual or constructive notice. This instruction, approved by the YMCA, advised the jury that it could infer constructive knowledge "from evidence that the condition is of such a character or has existed a sufficient length of time that the defendant, YMCA, should have had knowledge of it." Because sufficient evidence reasonably supported that the slippery shower room floor existed for a period of time adequate for the YMCA to have discovered it, the trial court correctly denied the YMCA's motion for a directed verdict on the notice issue.

B. YMCA'S OPEN AND OBVIOUS DANGER MOTION

The YMCA next complains that the trial court should have granted its motion for a directed verdict because the soap scum amounted to an open and obvious condition. In *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992), our Supreme Court defined open and obvious hazards as dangers "known to the invitee or so . . . obvious that the invitee might reasonably be expected to discover them." When a potentially dangerous condition "is wholly revealed by casual observation," the premises owner owes its invitees no duty to warn of the danger's existence. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474; 499 NW2d 379 (1993). The test for an open and obvious danger focuses on the inquiry: Would an average person of ordinary intelligence discover the danger and the risk it presented on casual inspection? *Id*. at 475. Our Supreme Court has cautioned that when applying this test, "it is important for courts ... to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 523-524; 629 NW2d 384 (2001).

Dascola testified that after she fell, she noticed small specks of dried soap scum at the edge of the shower stall. None of the other trial witnesses testified that the small white spots on the floor appeared visible to a casual observer entering the shower. On the basis of the instant record, we decline to hold as a matter of law that the small white spots of dried soap on the floor of the shower constitute an open and obvious danger of excessive floor slipperiness. Because reasonable minds could differ with respect to whether the spots qualified as obvious to a reasonable invitee on casual inspection, we conclude that the trial court properly denied the YMCA's motion for a directed verdict premised on the open and obvious nature doctrine.

C. DASCOLA'S OPEN AND OBVIOUS DANGER MOTION

Lastly, the YMCA disputes the propriety of trial court's ruling that the soap scum was not open and obvious as a matter of law, and the court's grant of a directed verdict to Dascola on this issue. In upholding the trial court's denial of the YMCA's directed verdict motion premised on the open and obvious danger doctrine, we explained that the soap scum did not appear open and obvious *as a matter of law*. In part, we rested our conclusion on the fact that reasonable observers could reach different positions concerning the obviousness of the danger presented. The trial court reached the same opinion when it denied the YMCA's directed verdict motion with respect to the open and obvious danger doctrine: "And the Court would not find that the condition was open and obvious, as a matter of law, because somebody was laying on the floor." Pursuant to the same reasoning, we conclude that the trial court erred by directing a verdict in Dascola's favor on the open and obvious question. Notwithstanding that no *direct* evidence substantiated that the white spots were obvious to Dascola or any of the other trial witnesses, the entirety of the present circumstances fall short of conclusively demonstrating that on casual inspection, an average person of ordinary intelligence would have failed to discover the danger and the risk it presented. The visible presence of the spots comprises at least some circumstantial evidence of their obvious nature. Genuine issues of material fact thus remain in the present record concerning the obviousness of the spots to a casual observer. Given Dascola's description of the soap scum residue, a jury could reasonably infer that the white spots were visible on casual inspection, and represented dried soap that could become dangerous when wet. Because conflicting inferences reasonably arise from Dascola's testimony about the white spots

on the shower floor, the trial court improperly removed this question from the jury for a resolution.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Douglas B. Shapiro